IN THE

Supreme Court of the United States

No. 73-1200

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTRIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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No.

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,

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v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners, Commonwealth of Pennsylvania and Pennsulvania Public Utility Commission, respectfully pray that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Third Circuit, entered in this proceeding on September 20, 1973 as amended November 2, 1973,[1] and on January 18, 1974.

OPINIONS BELOW

The first opinion of the U.S. Court of Appeals is reported as *In Re Central Railroad Company of New Jersey*, 486 F.2d 1124, and is printed in Appendix A hereto (App., 1a-

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[1] Rehearing denied November 5, 1973.

6a). The unreported order of the reorganization court for The Central Railroad Company of New Jersey (No. 550) is printed in Appendix A (App., 9a-10a).

The second opinion (judgment order) of the U.S. Court of Appeals is not reported, and is printed in Appendix B hereto (App., 11a). The unreported order of the same reorganization court (No. 583), together with the letter-opinion of the court, are printed in Appendix B (App., 12a-16a).

The opinions of the Interstate Commerce Commission are reported as *Central R. Co. of New Jersey - Abandonment*, 342 I.C.C. 227, and *Routing via Oak Island Jct., New Jersey*, 341 I.C.C. 129. The unreported orders denying petitions for rehearing are printed hereto in Appendix C (App. 17a-20a).

JURISDICTION

The first judgment of the U.S. Court of Appeals was entered on September 20 as amended November 2, 1973, rehearing denied November 5, 1973 (App., 7a-8a). The second judgment was entered on January 18, 1974 (App. 11a). The jurisdiction of this court is conferred by 28 U.S.C. 1254(1), 2101(c).

QUESTION PRESENTED

Whether judicial review of line abandonment and tariff routing orders of the Interstate Commerce Commission, involving a railroad in reorganization, should be instituted in the reorganization court, or whether such review should take place in a three-judge district court under the Urgent Deficiencies Act and venue provisions of the Judicial Code.

STATUTES INVOLVED

The statutes principally involved are sections 1336, 1398 and 2325 of the Judicial Code, 28 U.S.C. 1336, 1398 and 2325. They are set forth in Appendix C (App., 21a-22a).

STATEMENT

This case concerns the proper federal court which should review orders of the Interstate Commerce Commission where one or more of the railroads involved in the agency proceeding is in reorganization.

I.C.C. Proceedings

The Central Railroad Company of New Jersey (CNJ) is in reorganization.[2] In May, 1971, it filed various abandonment applications with the Interstate Commerce Commission (I.C.C.), pursuant to section 1(18)-(20) of the Interstate Commerce Act[3] seeking, as here pertinent, to abandon its operation over leased lines in Pennsylvania, which extend generally from the New Jersey-Pennsylvania boundary at Phillipsburg to Scranton. The leased lines are known as the Lehigh & Susquehanna Railroad (L&S). The L&S is owned by Reading Company (Reading),[4] subject to a leasehold interest held by Lehigh Coal & Navigation Company (LC&N).

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[2] No. B-401-67 (D.N.J.). Section 77 of the Bankruptcy Act, 11 U.S.C. 205.

[3] 49 U.S.C. 1(18)-(20).

[4] Reading is in reorganization. Bank. No. 71-828 (E.D. Pa.)

Lehigh Valley Railroad Company (Lehigh Valley)[5] and Reading filed rival applications to extend their operations[6] over the L&S lines, subject to prior approval of CNJ's applications for abandonment of operation.

Beginning in September, 1971, CNJ and its connecting railroads filed various tariff schedules naming changes in routes, so as to substitute interchange points for traffic moving over the L&S lines. These tariff schedules were suspended pursuant to section 15(7) of the Interstate Commerce Act.[7]

Commonwealth of Pennsylvania and Pennsylvania Public Utility Commission, (collectively, "Pennsylvania"), vigorously opposed CNJ's withdrawal from the Commonwealth, and also opposed the related tariff changes.

CNJ on April 1, 1972, abruptly ceased operations in Pennsylvania, while the I.C.C. proceedings were still in progress. CNJ did this by virtue of an order from its reorganization court, which was affirmed without opinion by the Court of Appeals. 455 F.2d 989 (3rd Cir. 1972), cert. den. 409 U.S. 889.

The I.C.C. on May 26, 1972 (served June 2), issued its initial decisions in the abandonment-extension case (Finance Docket No. 26659), and in the tariff routing case (Investigation & Suspension Docket No. 8667). The I.C.C. concluded to grant CNJ's abandonment application and to grant Lehigh Valley's extension application, subject to various routing conditions. 342 I.C.C. 227 and 341 I.C.C. 129. Pennsylvania, and other parties, petitioned for reconsidera-

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[5] Lehigh Valley is in reorganization. Bank No. 70-432 (E.D. Pa.)

[6] The applications were considered under 49 U.S.C. 1(18)-(20). The Reading application did not include the entire L&S lines.

[7] 49 U.S.C. 15(7).

tion.[8] These petitions were denied August 23, 1972 (served September 11).

Court Proceedings

Pennsylvania applied to the CNJ reorganization court for permission to review the CNJ abandonment orders in the U.S. District Court for the Middle District of Pennsylvania; Pennsylvania instituted an action to review the Lehigh Valley and Reading extension orders in the U.S. District Court for the Middle District of Pennsylvania.[9]

Pennsylvania was required to seek leave of the CNJ reorganization court, prior to the institution of judicial review of the CNJ abandonment and tariff routing orders, by virtue of an earlier court order which enjoined all persons from instituting or maintaining actions affecting CNJ's operations in Pennsylvania in any court other than the CNJ reorganization court, or without obtaining permission of that court to do so.

The CNJ reorganization court denied Pennsylvania's petition for leave to sue in the U.S. District Court for the Middle District of Pennsylvania. No opinion was rendered. (App., 12a-16a). Pennsylvania appealed that determination.

The Court of Appeals affirmed both decisions. In its first opinion, the Court of Appeals reasoned that Congress intended appeals of abandoment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceeding and not in a court of coordinate jurisdiction. The court suggested that Pennsylvania should have appealed from Order No. 514, entered July 5, 1972, which

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[8] 49 U.S.C. 17(6); 49 C.F.R. 1100.101.

[9] Civil No. 73-63, *Pennsylvania v. United States* (M.D. Pa.)

authorized CNJ's trustee to implement the I.C.C. orders of May 26, 1972, prior to the disposition by the I.C.C. of petitions for reconsideration on August 23, 1972. The court said that the reorganization court could have convened a three judge district court under the Urgent Deficiencies Act at the hearing on Order No. 514.

The court considered the I.C.C.'s consideration of the abandonments as being a "referral" case governed by 28 U.S.C. 1336(b) and 1398(b). Those sections of the Judicial Code require that the district court which refers a question or issue to the I.C.C. for determination shall have exclusive jurisdiction and venue of any civil action to enjoin any order of the I.C.C. arising out of such referral. (App., 21a).

The Court of Appeals specifically relied also upon its earlier decision, 455 F.2d 989, resulting in the abandonment of CNJ's lines in Pennsylvania.

REASONS FOR GRANTING THE WRIT

THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

The decisions below require that public agencies bring a "civil action" in the railroad reorganization court to review I.C.C. orders affecting the carrier in reorganization, rather that in a statutory three-judge court. Here, Pennsylvania resides and has its principal offices within the jurisdiction of the U.S. District Court for the Middle District of Pennsylvania, and not in the District of New Jersey. Moreover, a railroad reorganization court is a single-judge court, whereas judicial review of I.C.C. orders under the Urgent Deficiencies Act takes place in three-judge district courts which are convened by the Chief Judge of the Circuit. The United States

of America is the defendant in such actions. 28 U.S.C. 2321-25.

Heretofore, it has been the settled practice to institute actions directly in three-judge courts against the United States to enjoin I.C.C. abandonment and tariff routing orders. Indeed, the Supreme Court decided this question in *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, a case involving a railroad in reorganization under section 77 of the Bankruptcy Act. The Court stated, 328 U.S. at 151, fn. 11:

> If the (abandonment) order of the Commission were challenged, its review could of course be had only in the manner provided by statute. See *El Dorado Oil Works v. United States*, 328 U.S. 12.

The exception to the rule that I.C.C. abandoment orders are reviewed in three-judge courts is where the abandonments are considered by the I.C.C. together and as part of the plan of reorganization under section 77(e) and 77(f) of the Bankruptcy Act. *Chicago & N.W. Ry. Co. v. United States*, 52 F. Supp. 65 (N.D. Ill. 1943), aff'd 320 U.S. 718; *New Haven Inclusion Case*, 399 U.S. 392, 429 (1970); *In Re Missouri Pac. R. Co.*, 93 F. Supp. 852, 863 (E.D. Mo. 1950). The instant proceedings are not part of the plan of reorganization. At the request of CNJ, the I.C.C. has deferred the institution of any hearings on CNJ's plan of reorganization, and the I.C.C. specifically declined to consolidate the abandonments with any plan of reorganization.

There are a number of railroads undergoing reorganization in the Northeastern part of the United States. The question presented is of considerable importance to the orderly administration of the judicial system.

I. I.C.C. Orders Involving a Railroad in Reorganization Are not Made by Referral From a District Court.

Congress in 1964 amended sections 1336 and 1398 of the Judicial Code, 28 U.S.C. 1336, 1398, to provide where the district court refers a question or issue to the I.C.C., the court which referred the question shall have exclusive jurisdiction and venue of a civil action to enjoin or set aside any order of the I.C.C. arising out of the referral, and such action shall be filed within 90 days from the date the I.C.C. order becomes final. There is nothing in the legislative history of these amendments to the Judicial Code to suggest that instructions by a reorganization court that the trustee file certain applications and tariffs with the I.C.C. makes any action by the trustee a "referral" question. See: *I.C.C. v. Atlantic Coast Line R. Co.*, 383 U.S. 576 (1966).

Indeed, a "district court" is not the same as a "reorganization court", and the concept of a "civil action" being filed in a "reorganization court" has obvious difficulties.

The I.C.C. decisions authorizing abandonments and tariff routing changes were rendered exclusively under the provisions of the Interstate Commerce Act. Judicial review should take place in the statutory manner provided for review of I.C.C. orders, i.e., under the Urgent Deficiencies Act. This court observed in *Callaway v. Benton*, 336 U.S. 132, 142, that "Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate."

The decision of the Court of Appeals, in effect, means that all I.C.C. orders of any type, affecting a railroad in reorganization, can be made subject to judicial review in a single judge court, rather than be subject to judicial review in statutory three-judge courts.

II. The Reorganization Court Cannot Cut Off Pennsylvania's Remedies Under the I.C.C.'s Rules.

The Court of Appeals relies heavily upon Order No. 514 of the reorganization court, entered July 5, 1972, suggesting that Pennsylvania should have taken an appeal from that court order which authorized CNJ's trustee to implement the I.C.C. orders. But the I.C.C. orders of May 26, 1972 were subject to petitions for reconsideration.

There clearly was no basis for an appeal from the July 5 order. There was no change in the status quo – CNJ had ceased operations in Pennsylvania several months prior thereto. The authority of the CNJ reorganization court flowed from the I.C.C. orders, and those orders were subject to petitions for reconsideration.

It is premature to progress judicial review of I.C.C. orders while petitions for reconsideration are pending. The I.C.C. orders were not "final" at the time of hearing on Order No. 514. As Judge (now Chief Justice) Burger noted in *Outland v. C.A.B.*, 284 F.2d 224 (D.C. Cir. 1970):

> "However, while making judicial review available without a motion for rehearing, that statute did not operate to repeal the law with respect to finality. Where a motion for rehearing is in fact filed there is no final order until the rehearing is denied, as we said in *Braniff Airways, Inc. v. Civil Aeronautics Board*, supra."

Further, Pennsylvania cannot urge upon review of an I.C.C. order any contentions not previously urged in the agency proceeding by some party. Thus to require judicial review prematurely would act to eliminate substantive rights. *United States v. Tucker Truck Lines*, 344 U.S. 33, 36-38 (1952); *Yonkers v. United States*, 320 U.S. 685, 688 (1944).

There is a duty of a party to exhaust his administrative remedies before seeking judicial review of the agency determination. *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-51 (1938).

The theory of the Court of Appeals is that review of the I.C.C. orders should be in the context of the reorganization proceeding. However, the reorganization procedure conflicts with the agency's procedure regarding petitions for reconsideration, established by statute as well as regulation. 49 U.S.C. 17(6); 49 C.F.R. 1100.101.

III. The Decision of the Court of Appeals Is Inconsistent with Its Own En Banc Ruling.

The Court of Appeals placed reliance upon its 1972 decision permitting CNJ to cease operations in Pennsylvania by virtue of the order of the CNJ reorganization court, and without the necessity of prior approval from the Interstate Commerce Commission. Yet that decision was effectively overruled a year later by the en banc decision in *In Re Central Railroad Company of New Jersey*, 485 F.2d 208.

This court denied certiorari on January 4, 1974. *R. D. Timpany v. State of New Jersey, et al.*, 42 U.S. Law Week 3384.

CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgments of the Third Circuit.

Respectfully submitted,

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February, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 73-1110

In the Matter of

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,

Debtor

COMMONWEALTH OF PENNSYLVANIA and PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D. C. No. B 401-67)

Argued July 20, 1973
Before VAN DUSEN and WEIS, *Circuit Judges.*

Reargued September 12, 1973
Before VAN DUSEN, ROSENN and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed September 20, 1973)

(As amended November 2, 1973)

PER CURIAM:

This appeal challenges the right of a Section 77 reorganization court to deny the Commonwealth of Pennsylvania and its Public Utility Commission leave to file an action in the United States District Court for the Middle District of Pennsylvania to review orders of the Interstate Commerce Commission, concerning tariff routings and authorizing the abandonment by the reorganization trustee of certain lines in Pennsylvania and western New Jersey.[1]

After the debtor had lost more than 100 million dollars from 1958-1971, the trustee presented in 1971 a "blueprint for survival" to deal with a severe liquidity crisis which threatened termination of all its operations. An important part of this "blueprint" involved abandonment of the debtor's unprofitable operations in Pennsylvania[2] and reduction of the debtor's operations to six heavily populated and industrialized north-central New Jersey counties. On May 7, 1971, and thereafter the trustee, pursuant to section 77(o) of the Bankruptcy Act (11 U.S.C. § 205(O)),

1. Order No. 550 dated December 20, 1972 (D.N.J. Bankruptcy No. 401-67), contained this language, *inter alia*:

"IT IS, . . . ORDERED that the petition for leave to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to judicially review certain orders of the Interstate Commerce Commission in Finance Docket No. 26659 and in Investigation and Suspension Docket No. 8667 is denied; . . . ."

2. These operations were to be conducted by the Lehigh Valley Railroad, which operated parallel lines in Pennsylvania at that time.

sought the approval of the reorganization court for abandonment of various portions of lines operator by the debtor, including those in Pennsylvania, and these applications eventually resulted in Orders Nos. 410, 451 and 514 approving abandonments. As a result of the May 7, 1971, and subsequent applications, the reorganization court authorized the trustee to file requests for authorizations with the Commission for such abandonments, which requests were granted on August 20, 1971, and May 26, 1972. On December 20, 1971, the reorganization court issued Order 445, directing the trustee to suspend all CNJ operations in Pennsylvania by April 1, 1972, pending the Commission's final decision on the abandonment application, and enjoining all parties from instituting or maintaining in any other court any action affecting CNJ operations in Pennsylvania, or the abandonment thereof, without the permission of the reorganization court. This court affirmed Order 445, *In the Matter of Central Railroad Company of New Jersey, Debtor,* 455 F.2d 989 (3d Cir. 1972). On May 26, 1972, the ICC granted the debtor permission to abandon all its lines in Pennsylvania, subject to certain conditions. *Central Railroad Company of New Jersey-Abandonment,* 342 I.C.C. 277 (1972).[3] After hearing, the reorganization court,

3. The Commission used this language in its "Conclusions" at 288 and 290-91:

"The overriding factor with which we are faced, is that since 1967, CNJ has been debtor in reorganization under the Bankruptcy Act before the United States District Court for the District of New Jersey. Its position has continuously deteriorated, as have other railroads serving the New York metropolitan area. CNJ now may be considered *in extremis.* During and since 1970, its losses have amounted to more than $1 million per month. Under the circumstances, some form of drastic remedial action became imperative. The subject application to abandon, and its various parts, represents CNJ's election, approved by the Reorganization, to seek to terminate all operations in Pennsylvania, and to reduce and restructure its lines and operations in New Jersey. The application is properly filed under section 1(18)-(20).

. . .

"[T]he record as it stands does support our concluding that the fully distributed net income deficits in Pennsylvania have been sizeable each year, even prior to payment of the annual lease rental to LC&N for operation over the lines of L&S. . . . Also, the record establishes, and we find, that the State of New Jersey for some years has provided various forms of railroad passenger and freight service subsidies and other financial aid to CNJ. Obviously, it sought to assure the capability of CNJ to continue in business as a railroad in New Jersey. On the other hand, the

by order No. 514 dated July 5, 1972, authorized (a) compliance by the trustee with such conditions, and (b) the abandonments of the Pennsylvania lines.[4] No appeal was taken from such order.[5] However, by motion returnable December 11, 1972, appellants sought leave to file the action described in the first sentence of this opinion.

We have concluded that the above-quoted language of order No. 550 (note 1) should be affirmed. On the facts presented by this record, including the failure of appellants to appeal from order No. 514 and the affirmance of order No. 445 by this court (455 F.2d 989, *supra*) resulting in the abandonment of the Pennsylvania lines, the reorganization court had the authority to protect its jurisdiction by precluding review of the abandonment of the Pennsylvania lines in any other district court. See 28 U.S.C. §§ 1336(b) and 1398(b);[6] *New Haven Inclusion Cases*, 399

3. (Continued)

Commonwealth of Pennsylvania has not referred to any present or prospective program of assistance to railroads in which CNJ has been or would be able to participate as a recipient."

Its "ultimate findings" at page 304 included this paragraph:

"Subject to the imposition of traffic protective conditions and employee protective conditions set forth in detail in the 'Conclusions' sections of this report, we find in Finance Docket No. 26659 and Finance Docket No. 26659 (Sub-Nos. 1, 2, 3, 5, 9, 10, 11, 12, 14, 15, 21, and 28), that the present and future public convenience and necessity permit abandonment and abandonment of operation by Central Railroad Company of New Jersey and by certain subsidiary companies, all designated hereinbefore and individually identified in title pages of the certificate and order herein, and in greater detail in *appendix A*, attached to the report."

4. It is noted that on timely application to the reorganization court at this hearing, it could have convened a three-judge court under 28 U.S.C. §§ 2321-25. *Cf. Bondholders Protective Committee v. ICC*, 432 F.2d 268, 270-71 (3d Cir. 1970).

5. Because of the basis for the affirmance of the relevant part of Order No. 550 stated below, it is not necessary to determine whether the failure to appeal from such order and the decisions of this court on March 10, 1972 (see *Matter of the Central Railroad Company of New Jersey, Debtor, supra*, and related cases reported at 455 F.2d 988, 989 and 990) require affirmance of such part of Order No. 550 under the principle of law of the case and res judicata. See *Antonioli v. Lehigh Coal and Navigation Co.*, 451 F.2d 1171 (3d Cir. 1971); 1B Moore's Federal Practice, § 0.404(1), pp. 402-03 (2d ed.).

6. Although the parties have not furnished a copy of order No. 410 to this court in the appendices in this appeal, paragraphs 9 and 10 of the Petition of LC&N (Docket 2018 in district court) recite at 24a-1 and 25a of the trustee's appendix, *inter alia:*

U.S. 392, 420-422 (1970); *In re Penn Central Transportation Company*, 446 F.2d 1109, 1111-1112 (3d Cir. 1971); *Bondholders Protective Committee, supra* at 270-71; *In re Huntingdon & Broad Top Mt. R. R. & Coal Co.*, 213 F.2d 411, 416-17 (3d Cir. 1954), where Judge Biggs made the pertinent observation at 417, "It is time that this chapter in the history of [the railroad] is brought to a close."

That part of order No. 550 quoted in note 1 of this opinion will be affirmed.

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6. (Continued)

"9. On May 25, 1971, by order No. 410, this Court authorized the Trustee to file applications with the Interstate Commerce Commission for permission to abandon certain lines then operated by said Trustee, which lines included the L&S system located in Pennsylvania. By said order No. 410, this Court reserved jurisdiction of the subject matter and directed said Trustee to apply further to this Court for authority to abandon any lines or operations that may be authorized to be abandoned by the Interstate Commerce Commission.

"10. On May 26, 1971, the Trustee filed with the Interstate Commerce Commission, pursuant to order No. 410, a petition for abandonment of the aforesaid lines. . . ."

The wording and legislative history of 28 U.S.C. §§ 1336(b) and 1398(b), as well as of § 77(o) of the Bankruptcy Act (11 U.S.C. § 205(o)), show that Congress intended appeals of abandonment orders in railroad reorganization cases to be reviewed in the context of the reorganization proceeding and not in a court of coordinate jurisdiction. See *Leonard Bros. Trucking Co. v. United States*, 301 F. Supp. 893, 898 (S.D. Fla. 1969); House Report 1015, 88th Cong., 2d Sess., to accompany H.R. 7508; see also *ICC v. Atlantic Coast Line R. Co.*, 383 U.S. 576, 579-80 (1966); *Keller Industries, Inc. v. United States*, 449 F.2d 163, 166-67 (5th Cir. 1971); *Louisville and Nashville R. Co. v. Knox Homes Corp.*, 343 F.2d 887, 897 n.38 (5th Cir. 1965). When § 77(o) was originally added to the Railroad Reorganization Act in 1935, preliminary drafts of the bill (H.R. 6249, later H.R. 8587, 74th Cong., 1st Sess.) containing that section provided, *inter alia*:

"The conclusion of the judge that any property authorized to be abandoned or sold hereunder, *unless set aside by a court of competent jurisdiction*, shall raise a conclusive presumption that such abandonment or sale was justified and that such trustees were not justified in opposing same." [Emphasis supplied.]

The above-quoted language was omitted from the bill adopting § 77(o) as finally passed. See House Report 1283, 74th Cong., 1st Sess.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 73-1110

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

(D.C. No. B-401-67 In Bankruptcy)

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel, and later reargued.

On consideration whereof, it is now here ordered and adjudged by this Court that that part of order No. 550 of the said District Court which is referred to in the opinion of this Court and quoted in note 1 of said opinion, filed December 20, 1972 be and the same is hereby affirmed. Costs taxed against appellants.

ATTEST:

/s/ Thomas F. Quinn
Clerk

September 20, 1973

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 73-1110

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, and VAN JUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Van Dusen
Judge

Dated: November 5, 1973

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of

THE CENTRAL RAILROAD)	In Proceedings for the
COMPANY OF NEW JERSEY,)	Reorganization of a Railroad
Debtor.)	No. B 401-67
	ORDER NO. 550

ORDER DENYING APPLICATION FOR LEAVE TO FILE AN ACTION IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND GRANTING OTHER RELIEF.

This matter having been opened to the Court on petition of the attorneys for the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission as amended orally at the hearing for (a) leave, pursuant to Order No. 445 of this Court, to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to judicially review certain orders of the Interstate Commerce Commission in its Finance Docket No. 26659 and in its Investigation and Suspension Docket No. 8667 and (b) for certain other relief; and the matter having come on for hearing which was duly noticed; and the Court having considered the papers filed and arguments made; and all parties in interest having been heard or having been given the opportunity to be heard; and good cause appearing therefor;

IT IS, on this 20th day of December, 1972,

ORDERED that the petition for leave to file an action against the United States of America in the United States District Court for the Middle District of Pennsylvania to

judicially review certain orders of the Interstate Commerce Commission in Finance Docket No. 26659 and in Investigation and Suspension Docket No. 8667 is denied; and it is

FURTHER ORDERED that petetioner is granted leave to dismiss its action instituted September 24, 1972 in the United States District Court for the Middle District of Pennsylvania bearing Docket No. Civil 71-416; and it is

FURTHER ORDERED that, upon petitioner's request, the appeal of petitioner from Order No. 467 of this Reorganization Court is dismissed.

/s/ Anthony T. Augelli
S.J.U.S.D.C.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 73-1517

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY,
Debtor

COMMONWEALTH OF PENNSYLVANIA and
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

On Appeal from the United States District
Court for the District of New Jersey
D. C. No. B-401-67 in Bankruptcy

Argued January 9, 1974

Before: ADAMS, HUNTER and WEIS, *Circuit Judges*

JUDGMENT ORDER

After considering the appellants' contentions that the district court erred in refusing to consider appellants' appeal of an order of the Interstate Commerce Commission because such order was final and the time for appeal had expired, it is is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed. *See* In the Matter of the Central Railroad Company of New Jersey, No. 73-1110 (3d Cir. Sept. 20, 1973).

Costs taxed against appellants.

BY THE COURT,

/s/ Arlin M. Adams
Circuit Judge

DATED: January 18, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
ANTHONY T. AUGELLI
Sr. Judge

305 United States Court House
Newark, N. J. 07101

April 4, 1973

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744 Broad Street
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LETTER OPINION

The Central Railroad Company of New Jersey,
Debtor – Docket No. B. 401-67

Re: Application of The Lehigh Coal & Navigation Company for payment of money under Order No. 441.

Gentlemen:

Reference is made to the transcript of the hearing before this Court on December 11, 1972, and the exhibits marked in evidence at said hearing.

At issue is the finality of an order of the Interstate Commerce Commission (hereinafter ICC) bearing service date of June 2, 1972, which authorized the abandonment of the Debtor's railroad operation in that State of the Lehigh & Susquehanna lines (hereinafter L & S system) under a lease arrangement with the Lehigh Coal & Navigation Company (hereinafter LC&N).

This issue emerged as a result of a petition filed with the Court by LC&N, in which it seeks to compel the Trustee of the Debtor to pay LC&N the sum of $500,000.00, in cash, as an administration expense, under the terms of a settlement agreement entered into between the Debtor's Trustee and LC&N on November 17, 1971, which agreement was approved by this Court's Order No. 441. A condition precedent to the Trustee's obligation to pay LC&N $500,000.00 was the abandonment of the L & S system by the Debtor and the finality of the ICC order permiting abandonment of that operation.

The Trustee is willing to discharge his obligations under the settlement agreement of November 17, 1971, provided the ICC order of June 2, 1972, is a final order. The finality of that order was challenged in a joint petition filed by the Commonwealth of Pennsylvania and the Pennsylvania Public Utility Commission (hereinafter collectively Pennsylvania). At the hearing of December 11, 1972, Pennsylvania applied for leave to file a three-judge court action in the Middle District of Pennsylvania to review the ICC order of June 2, 1972, which authorized abandonment of the Debtor's Pennsylvania operations. The application was denied by this Court's Order No. 550.

The abandonment of the operation of the L & S system in Pennsylvania by the Debtor was effected pursuant to Section 77(o) of the Bankruptcy Act. After hearing, this Court, by Order No. 514 entered on July 5, 1972, authorized the abandonments granted by the ICC order of June 2, 1972. On July 3, 1972, Pennsyvlania filed with the ICC a petition for reconsideration of the abandonment orders involving Debtor's Pennsylvania operations, which petition was denied in September, 1972. No appeal was

taken from this Court's Order No. 514, notwithstanding that any order made by a judge under Section 77(o) "shall be a final order for purposes of appeal."

The time to appeal has long since expired and Pennsylvania should not now be heard to complain about the ICC order of June 2, 1972, or of this Court's Order No. 514, entered July 5, 1972, which authorized the abandonment granted by the ICC of the Debtor's operation of the L & S system in Pennsylvania. No application was made to have this Court stay its hand pending a decision by the ICC on the petition for reconsideration filed by Pennsylvania. In any event, and as previously noted, said petition for reconsideration was denied.

Under the circumstances, this Court finds that the conditions precedent set forth in the settlement agreement of November 17, 1971, have been fully met; that there is finality to the ICC orders and the orders of this Court regarding the abandonment of the Debtor's operations in Pennsylvania; and that the Trustee should make suitable arrangement s, pursuant to the terms of the agreement, to pay LC&N the sum of $500,000.00 in full settlement of all claims arising out of the operation of the L & S system in Pennsylvania by the Debtor.

Counsel for the Trustee will please submit an appropriate order on notice to all parties concerned.

Yours very truly,

/s/ Anthony T. Augelli

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

In the Matter of	)	
		In Proceedings for the
THE CENTRAL RAIL-	)	Reorganization of a Railroad
ROAD COMPANY	)	
OF NEW JERSEY,	)	No. B 401-67
Debtor.	)	
		ORDER NO. 583

ORDER TO CONSUMMATE SETTLEMENT WITH THE LEHIGH COAL & NAVIGATION COMPANY

This matter having been opened to the Court by application of The Lehigh Coal & Navigation Company for payment of monies due under Order No. 441, the matter having come on for hearing on December 11, 1972, which was duly noticed and all parties in interest having been heard or having been given an opportunity to be heard, and the Court having considered all papers filed in connection therewith and all arguments of counsel and having decided the application by a letter opinion dated April 4, 1973, and good cause appearing therefor,

IT IS, on this 15th day of May, 1973,

ORDERED that:

(1) The Trustee be and is hereby directed to fully consummate the settlement embodied in the agreement authorized by Order No. 441, including the payment of $500,000 to The Lehigh Coal & Navigation Company;

(2) Said payment may be made by the Trustee borrowing such funds for a period, which may be less than but shall not exceed 4 years, from monies held in a special account pursuant to Order No. 157, upon terms to be fixed by further order of this Court; and

(3) The Trustee, when paying said $500,000 to The Lehigh Coal & Navigation Company, is directed to make suitable arrangements to protect the interests of this estate in the event the aforesaid direction to consummate the settlement, including the payment of $500,000 set forth in Paragraph 1 hereof, is reversed upon any appeal from this Order.

/s/ Anthony T. Augelli
S.U.S.D.J.

APPENDIX C

SERVICE DATE
SEPTEMBER 11, 1972

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of August, 1972.

Finance Docket No. 26659

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN PHILLIPSBURG, N. J. AND HUDSON, PA.

Finance Docket No. 26659 (Sub-No. 1)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION MINSI TRAIL BRANCH IN LEHIGH COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 2)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION NESQUEHONING VALLEY BRANCH IN CARBON COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 3)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION NANTICOKE BRANCH IN LUZERNE COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 5)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BUTTONWOOD BRANCH LUZERNE COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 9)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN MINOOKA JUNCTION AND SCRANTON, PA.

Finance Docket No. 26659 (Sub-No. 10)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE CENTRAL RAILROAD CO. OF PENNSYLVANIA -- ABANDONMENT OF OPERATION EASTON & WESTERN BRANCH IN NORTHAMPTON COUNTY, PA.

Finance Docket No. 26659 (Sub-No. 11)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE ALLENTOWN TERMINAL RAILROAD COMPANY -- ABANDONMENT OF OPERATION ALLENTOWN, PA.

Finance Docket No. 26659 et al.

Finance Docket No. 26659 (Sub-No. 12)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN HUDSON-UNION JUNCTION AND MINOOKA JUNCTION, PA.

Finance Docket No. 26659 (Sub-No. 14)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT OF OPERATION BETWEEN LEHIGHTON AND PACKERTON, PA., AND BETWEEN HETCHEL AND FRASER, PA.

Finance Docket No. 26659 (Sub-No. 15)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE LEHIGH AND NEW ENGLAND RY. COMPANY -- ABANDONMENT OF OPERATIONS BETWEEN BETHLEHEM AND UHLERS, PA., AND BETWEEN HAUTO AND TAMAQUA, PA.

Finance Docket No. 26659 (Sub-No. 16)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN HAMPTON AND PHILLIPSBURG, N. J.

Finance Docket No. 26659 (Sub-No. 17)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN HIGH BRIDGE AND WHARTON, N. J.

Finance Docket No. 26659 (Sub-No. 18)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN ROYCE AND FLEMINGTON, N. J.

Finance Docket No. 26659 (Sub-No. 19)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN MATAWAN AND FREEHOLD, N. J.

Finance Docket No. 26659 (Sub-No. 21)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN KEYPORT AND ATLANTIC HIGHLANDS, N. J.

Finance Docket No. 26659 (Sub-No. 23)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN EAST LONG BRANCH AND BRANCHPORT, N. J.

Finance Docket No. 26659 (Sub-No. 26)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY -- ABANDONMENT BETWEEN RARITAN AND HAMPTON, N. J.

Finance Docket No. 26659 (Sub-No. 27)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE DOVER AND ROCKAWAY RAILROAD -- ABANDONMENT BETWEEN WHARTON AND ROCKAWAY, N. J.

Finance Docket No. 26659 (Sub-No. 28)

R. D. TIMPANY, TRUSTEE OF THE CENTRAL RAILROAD CO. OF NEW JERSEY AND THE WHARTON AND NORTHERN RAILROAD -- ABANDONMENT BETWEEN MORRIS COUNTY JUNCTION AND GREEN POND JUNCTION, N. J.

Finance Docket No. 26773

JOHN F. NASH AND ROBERT C. HALDEMAN, TRUSTEES LEHIGH VALLEY RAILROAD COMPANY -- OPERATION BETWEEN EASTON AND SCRANTON, PA.

Finance Docket No. 26781

READING COMPANY -- OPERATION BETWEEN ALLENTOWN, PA., AND PHILLIPSBURG, N. J.

Upon consideration of the record in the above-entitled proceedings, the report and certificate and order of the Commission, decided May 26, 1972, and the petitions for reconsideration filed July 3, 1972, by the Railway Labor Executives' Association, and jointly by the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the City of Philadelphia, and those filed July 5, 1972, by the United Transportation Union and by the Erie Lackawanna Railway Company, the replies thereto filed July 24, 1972, by R. D. Timpany, Trustee of the property of the Central Railroad Company of New Jersey, and jointly by the Asbury Graphite Mills, Inc., Grief Bros., Corporation, Wedco, Inc., and Hunterdon County, N. J., of the reply filed July 25, 1972, by the Trustees of the Lehigh Valley Railroad Company; and of the telegram filed July 20, 1972, by the Trustees of the Lehigh Valley Railroad Company; and

It appearing, That the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered in the proceedings; that the findings in the report and certificate and order of May 26, 1972, are adequately supported by the record; that the conditions which were necessary for our approval of the transaction were imposed upon the Central Railroad of New Jersey and the Lehigh Valley Railroad Company, and not on the Erie Lackawanna as stated in the said telegram; that there has been presented no error of fact or law with respect to the matters complained of by petitioners; and, that no showing has been made warranting reconsideration:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

JOSEPH M. HARRINGTON
Acting Secretary

(SEAL)

SERVICE DATE
SEPTEMBER 11, 1972

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 23rd day of August, 1972.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667
ROUTING VIA OAK ISLAND JCT., NEW JERSEY

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 1)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 2)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 3)
ROUTING VIA BOUND BROOK JCT., NEW JERSEY

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 4)
ROUTING VIA LAKE JCT., N. J.

INVESTIGATION AND SUSPENSION DOCKET NO. 8667 (SUB-NO. 5)
ROUTING VIA LAKE JCT. N. J.

Upon consideration of the record in the above-entitled proceedings, the report and order of the Commission, decided May 26, 1972, and the petitions for reconsideration filed July 3, 1972, by the Railway Labor Executives' Association, and jointly by the Commonwealth of Pennsylvania, the Pennsylvania Public Utility Commission, and the City of Philadelphia, and those filed July 5, 1972, by the United Transportation Union and by the Erie Lackawanna Railway Company, the replies thereto filed July 24, 1972, by R. D. Timpany, Trustee of the property of the Central Railroad Company of New Jersey, and jointly by the Asbury Graphite Mills, Inc., Grief Bros., Corporation, Wedco, Inc., and Hunterdon County, N. J., of the reply filed July 25, 1972, by the Trustees of the Lehigh Valley Railroad Company; and of the telegram filed July 20, 1972, by the Trustees of the Lehigh Valley Railroad Company; and

It appearing, That the petitions for reconsideration set forth no material facts or arguments in addition to those previously considered in the proceedings; that the findings in the report and order of May 26, 1972, are adequately supported by the record; that the conditions which were necessary for our approval of the transaction were imposed upon the Central Railroad of New Jersey and the Lehigh Valley Railroad Company, and not on the Erie Lackawanna as stated in the said telegram; that there has been presented no error of fact or law with respect to the matters complained of by petitioners; and, that no showing has been made warranting reconsideration:

It is ordered, That said petitions be, and they are hereby, denied.

By the Commission.

JOSEPH M. HARRINGTON

(SEAL)

Acting Secretary

Title 28.–Chapter , U. S. Code

Sec. 1336. [*As codified June 25, 1948, August 30, 1964.*] [*28 U.S.C. § 1336.*] Interstate Commerce Commission's ORDERS

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annual or suspend, in whole or in part, any order of the Interstate Commerce Commission.

(b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.

(c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

Title 28.–Chapter 87, U. S. Code

Sec. 1398. [*As codified June 25, 1948, August 30, 1964.*] [*28 U.S.C. § 1398.*] Interstate Commerce Commission's ORDERS

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Sec. 2325. [*Codified June 25, 1948.*] [*28 U.S.C. § 2325.*]
INJUNCTION; THREE-JUDGE COURT REQUIRED

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.